No. 01-587 (3)

Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

RECEIVED
JAN 03 2002
LDC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

SHAWN LEMAIRE, ET AL
PETITIONERS

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICANT'S REPLY TO BRIEF IN OPPOSITION

Donald G. Cave
L.S.B.A. No. 4073
Michael L. Cave
L.S.B.A. No. 26002
CAVE LAW FIRM
3909 Plaza Tower Drive
Baton Rouge, LA 70816
Tel: (225) 292-3194

Counsel for Plaintiff-Applicants, Shawn LeMaire, Et Als

Franklin Press, Inc. Baton Rouge, Louisiana

11 pp

TABLE OF CONTENTS

PAGE

Summary of the Argument 1

Argument. 2

Conclusion. 7

Certificate 9

No. 01-587

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

SHAWN LEMAIRE, ET AL

PETITIONERS

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICANT'S REPLY TO BRIEF IN OPPOSITION

SUMMARY OF THE ARGUMENT

Contrary to the representations made by Danos & Curole Marine Contractors, Inc. in its brief in opposition to the application of applicant, a gap does exist in the L.H.W.C.A., as applied by O.C.S.L.A., in that 33 U.S.C. 933 does not define the terms "employer" or "employee." Since the Act itself does not define these terms, the courts below should have applied Louisiana law to fill this gap under 43 U.S.C.A.

1333(2)(A) which extends the adjacent state law to the subsoil and seabed of the Outer Continental Shelf and any artificial or fixed structures erected thereon. Since the tortfeasors, Danos & Curole Marine Contractors, Inc. and its employee, Phillips, are not employees or officers of the employer of the applicant, Lemaire, they should not be immune from a liability claim by LeMaire.

The courts below clearly ignored these precepts and, in effect, applied federal common law as represented by the decision of the Court of Appeals, Fifth Circuit, in *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F. 2d 1409. As a result, the real tortfeasors (Danos & Curole and Phillips) become totally immune from any responsibility in tort or Longshoreman's benefits to the applicant. Furthermore, the employer of applicant (Steen Production Services, Inc.) and its insurer cannot in any way recover the sums paid out in Longshoreman's benefits to applicant, adding to the inequity. Accordingly, this Honorable Court should grant writs in this case and reverse the decision of the Court of Appeals, Fifth Circuit, herein.

ARGUMENT

While the Court of Appeals, Fifth Circuit, acknowledged that this Honorable Court's decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 1969 clearly establishes that the remedy for personal injury, as for wrongful death, cannot be derived from admiralty law but must be governed by the law of the adjacent State, Louisiana, it eventually based its decision on a body of "federal common law." What the Court of Appeals, Fifth Circuit has done in the instant matter is essentially what this Honorable Court decried in *Rodrigue*. See also: *Chevron Oil Company v. Huson*, 404 U.S. 97, 100-101, 92 S.Ct. 349, 352-353 (1971).

The courts below erroneously failed to follow this Honorable Court's mandate in *Huson*, thereby creating federal common law as an alleged remedy. As this Honorable Court clearly stated in *Huson:*

> " . . . [U]nder the Lands Act, there is not even such limited freedom to create a federal statute of limitations, for Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. **Congress specifically rejected national uniformity and specifically provided for the application of state remedies** which demand state, not federal, statutes of limitation. **Thus, Congress made clear provision for filling in the 'gaps' in federal law** . . . *Chevron Oil Company v. Huson,* 404 U.S. 97, 104 and 105, 92 S.Ct. 349, 354 (1971). See also, *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 487-88, 101 S.Ct. 2870, 2880 (1981), quoting *Huson,* **" ' . . . it did not intend that federal courts fill in those 'gaps' by creating new federal law.' "** (Emphasis supplied).

However, this is exactly what the lower courts have done in the instant matter.

This Honorable Court went on to state in *Huson* that: "insofar as *Richards* bears on the present case, it supports our holding that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply." *Huson,* at 105, 92 S.Ct., at 354, (quoting *Richards v. United States,* 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (which held that under the Federal Tort Claims Act a federal court must apply 'the whole law of the State where the act or omission occurred.' *Id.*, at 11, 82 S.Ct., at 592)).

In sum, the clear congressional intent of 43 U.S.C. 1333(a)(1)&(2) and this Honorable Court's decisions in

Huson and *Rodrigue* should govern the instant matter. The Lands Act calls for the application of the Longshore and Harbor Workers' Compensation Act for compensation and state law negligence to fill in any statutory gaps. "It was the intent of Congress, expressed in the Senate Committee Report, in the Conference Report, and on the floor of the Senate, that state laws be 'adopted' or 'enacted' as federal law." See *Huson*, at 353, quoting *Rodrigue*, at 1838.

Pursuant to the Lands Act, state law should determine who is "in the same employ," as contemplated by the Longshore and Harbor Workers' Compensation Act (L.H.W.C.A.), as there is no statutory definition of "same employ" in L.H.W.C.A. and thus there is a gap in the federal statutory law which should be filled by state law, the representations of Danos & Curole notwithstanding. In the instant matter, **if state law were allowed to supplement and fill the gaps of federal law, there would be no inconsistencies in the federal law because state law would be used as surrogate federal law and hence would be adopted as federal law.**

The Court of Appeals, Fifth Circuit, in *Gaudet v. Exxon Corp.*, 506 F. 2d 351, 5th Cir., 1977 specifically noted that "Louisiana negligence law, pursuant to which plaintiffs sought recovery, is incorporated into federal law by this Act." See also: *Aymond v. Texaco,* 554 F.2d 206 (5th Cir. 1977). Danos & Curole erroneously relies herein upon the case of *Perron vs. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992) in support of its position. As previously pointed out, *Perron* and its progeny were an erroneous extension of federal law into an area already defined by Louisiana state law, and thus this ruling essentially created federal common law which has spawned numerous incestuous proteges. In *Perron*, the court attempted to fill in the gaps of the statu-

tory law set forth in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. with alleged federal common law, thereby totally ignoring the mandate of 43 U.S.C. Sec's. 1333 (a)(1) and (a)(2), as well as this Honorable Court's rationale set forth in *Rodrigue*, supra, *Huson*, supra, and *Richards*, supra.

Congress rejected the call for uniformity under the Outer Continental Shelf Lands Act (O.C.S.L.A.), 43 U.S.C. 1333, and specifically provided for state law remedies, where not inconsistent with federal laws. (Emphasis supplied). "Thus, Congress made clear provision for filling in the 'gaps' in federal law; it did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law." *Huson*, 92 S.Ct., at 354, referencing *Richards*, 82 S.Ct. 585, 592, (stating, "' . . . [F]ederal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply.'").

However, contrary to Congressional intent, the U.S. Supreme Court and previous Fifth Circuit decisions, *Perron*, was decided without following applicable Louisiana state law to the obvious "gap" in the federal statutory law. The application of the *Perron* decision in the instant matter clearly leads to absurd results in that it results in the creation of entire categories of **immune** tortfeasors who have not given any quid pro quo in return, violates the clear Congressional mandate that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply (See: *Huson*, at 354.); and it violates public policy and leads to inequitable administration of the applicable tort and compensation laws found in the O.C.S.L.A. and L.H.W.C.A. Even more egregiously, the *Perron* court accomplished all of the above under the

declared banner of "uniformity" and "consistency" **extending** the "Borrowing Employer Rule" to include all subcontractors and their employees as "coemployees" within the meaning of the L.H.W.C.A. *Perron vs. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992). (Emphasis supplied). **This is precisely the opposite of what Congress mandated when it enacted the Lands Act and made the call for application of state law in order to fill the gaps in federal law.** (Emphasis supplied).

The Courts below justified the application of *Perron* in exactly the same way. However *Perron* is not "federal law," rather it is federal common law jurisprudence which interprets federal statutory law and is therefore patently incorrect and inconsistent with the expressed Congressional intent of O.C.S.L.A. "Federal law," as contemplated by O.C.S.L.A., is federal **statutory law** (*Chevron v. Huson,* 92 S.Ct., at 354; *Richards v. United States*, 82 S.Ct., at 592; *Walter Oil & Gas Corp. v. NS Group, Inc.*, 867 F.Supp. 549 (S.D. Texas 1994), and nowhere in the Longshore and Harbor Workers' Compensation Act does it mandate that different subcontractors' employees should be considered as "in the same employ," and thus "coemployees," immune from liability under the L.H.W.C.A.

The analysis and reasoning of *Perron*, and hence its application in the instant matter, is clearly wrong under applicable federal laws of O.C.S.L.A. and L.H.W.C.A. The decision is a judicial interpretation not envisioned by Congress, nor provided for in either act. The decision is a clear violation of congressional intent because it effectively grants tort immunity to an otherwise third party defendant who is not liable for compensation and, if *Perron* is followed, also immune for third-party tort liability. In addition, it defeats the right of Steen Production Service, Inc. for indem-

nity and reimbursement for compensation benefits from the negligent third party (Danos & Curole) as envisioned by the L.H.W.C.A.

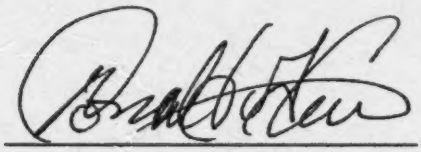
CONCLUSION

The clear result of the lower court decisions herein is that the applicable language of 33 U.S.C. 933(i) *"[p]rovided,* that this provision shall not affect the liability of a person other than an officer or employee of the employer" does not mean what it says. Since the Act itself does not define its own applicable terms, state law should apply to fill in the gap. Doing this, unless Charles Phillips is an officer or employee of Steen Production Service, Inc., which he is not, then Phillips and Plaintiff, LeMaire, are not "in the same employ." See 33 U.S.C. Sec's. 933(i) and 933(a).

The application of *Perron* to the instant matter by the courts below was clearly erroneous. This Honorable Court should reemphasize its holdings in *Rodrigue, Huson* and *Richards* and apply same to the obvious gap in the existing federal statutory structure in O.S.C.L.A. and L.H.W.C.A. as to the definition of the terms "employee," "employer" and "in the same employ," mandating the application of Louisiana law to resolve the issue presented by the instant fact situation. For all the reasons cited in the original brief of plaintiff-applicant and those cited above, this Honorable Court should grant a writ of certiorari herein.

Respectfully submitted:

Cave Law Firm
3909 Plaza Tower Dr.
Baton Rouge, LA 70816-4356
Tel: (225) 292-3194
Fax: (225) 292-3197



Donald G. Cave, #4073
Michael L. Cave, #26002

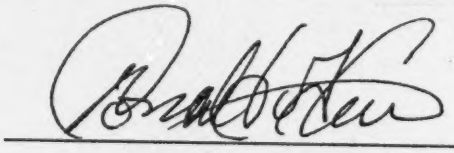
CERTIFICATE

I hereby certify that copies of the above and foregoing reply brief have this date been forwarded to the below-listed interested parties, or their counsel of record, at the addresses listed herein:

Mr. Raymond M. Allen
Attorney for Danos & Curole
and Charles Phillips
P. O. Drawer 3204
Lafayette, LA 70502

Mr. Christopher J. Aubert
Attorney for Norriseal, Inc.
506 E. Rutland St.
Covington, LA 70433

Baton Rouge, Louisiana this 17th day of December, 2001.



Donald G. Cave
Attorney for Plaintiff-Applicants